

UNITED STATES v.
ESTATE OF ARTHUR C. W. BOWEN, DECEASED AND
SUPERIOR PERLITE MINES, INC. (CONTESTEES);
HARBORLITE CORP. (INTERVENOR)

IBLA 78-426 Decided January 8, 1979

Appeal from decision of Administrative Law Judge Robert Mesch holding that the contestees had held and worked part of the Superior perlite placer claims to the extent necessary to qualify for patent under 30 U.S.C. § 38 (1976). Arizona 030706.

Affirmed.

1. Mining Claims: Lode Claims—Mining Claims: Placer Claims—Words and Phrases:

"Lode" and "placer." A placer mining claim has been defined as ground within defined boundaries which contain mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state, and may in most cases be collected by washing or amalgamation without milling. Whereas, a lode or vein has been defined as any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock; a body of mineral or mineral bearing rock within defined boundaries.

When mining claims have been located as placer claims for perlite which lies in a "blanket" or "pancake" in an almost horizontal plane and in its original state is encased between two different types of rock, where in places, the upper rock or layer has

been eroded away leaving the perlite exposed at the surface and in other places on the claims the upper layer is still present, and the mining of the perlite is characterized as essentially a hard rock operation, and when it is first extracted from the ground and then processed or, in effect, milled to produce a marketable product, the perlite is properly classified as a lode deposit which will not sustain a placer location.

2. Mining Claims: Generally—Mining Claims: Location— Mining Claims: Special Acts

Where it is determined that a person or association, they and their grantors, have met the fundamental requirements of the possessory rights section of the mining laws, 30 U.S.C. § 38 (1976), i.e., where they have held and worked their claims in this instance for the qualifying period of 5 years under the Arizona statute of limitations covering actions to recover real property, they are entitled to a patent to those areas where there are no conflicting mining claims, regardless of the fact that the claims were improperly located as placer claims for perlite lode deposits.

APPEARANCES: Fritz L. Goreham, Esq., Office of the Solicitor, Department of the Interior, Phoenix, Arizona, for contestant; Dean Estep, Esq., Engdahl, Jerman & Estep, Phoenix, Arizona, for contestees; Sidney B. Wolfe, Esq., Wolfe & Harris, P.A., Phoenix, Arizona, for intervenor.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Harborlite Corp. as intervenor in the contest of United States v. Estate of Arthur C. W. Bowen, Deceased and Superior Perlite Mines, Inc., has appealed from a decision by Administrative Law Judge Robert Mesch dated April 10, 1978. The Judge held that the contestees had qualified under 30 U.S.C. § 38 (1976) for patent for part of the Superior Perlite placer claims which had been the subject of the proceeding. The contest challenged the validity of the Superior Perlite No. 1 except that portion embraced in the Elva No. 1 lode mining claim, Survey No. 4677; the Superior Perlite No. 2 (amended) except that portion embraced in the Sandy No. 1 lode mining claim, Survey No. 4677; the Superior Perlite No. 3; and the Superior Perlite No. 4. The claims are located in secs. 8, 9, and 16, T. 2 S., R. 12 E., Gila and Salt River meridian, Pinal County, Arizona.

The contest proceedings were originally instituted by a complaint filed by the Arizona State Office, Bureau of Land Management (BLM), dated February 20, 1976, pursuant to a ruling of this Board in Estate of Arthur C. W. Bowen, Deceased, 18 IBLA 379 (1975), in which we directed that a contest be brought to determine whether the contestee is entitled to a patent under the provisions of 30 U.S.C. § 38 (1976) and pertinent regulations, and whether the perlite on the four placer claims in question is properly characterized as lode or placer.

The Bureau's contest complaint specifically charged:

1. The claims, by the nature of the deposits, were improperly located as placer claims.
2. The contestees have not held and worked the claims in such a manner as to qualify them for patent under the provisions of 30 U.S.C. sec. 38.
3. Valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws.

A hearing was held September 27 and 28, 1977, at Phoenix, Arizona. Harborlite Corp. was allowed to intervene at the hearing based on its position that it had acquired an interest in the four placer claims by quitclaim deed from the contestee, Superior Perlite Mines, Inc.

The Administrative Law Judge found the evidence presented supported the first charge of the complaint that the four claims were improperly located as placer claims. He ruled the claims were therefore invalid because a lode deposit will not sustain a placer location.

Irrespective of this improper location and designation of the claims, the Administrative Law Judge found that the contestees were still entitled to a patent under the possessory rights section of the mining laws, 30 U.S.C. § 38 (1976) ^{1/}, for those areas of the four Superior claims that were openly held and worked for the qualifying period under the Arizona 5-year statute of limitations covering actions to recover real property. The Judge, however, sustained the second charge of the complaint in part as to those areas of the four Superior claims that were held in conflict with other mining locations, i.e.,

^{1/} This section of 30 U.S.C. § 38 (1976) provides in pertinent part:

"Where such persons or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto * * * in the absence of any adverse claim; * * *."

the area of the Superior Perlite No. 1 that is embraced within (1) the Guzman lode mining claim that contains the workings known as the "Indian Caves" (which is apparently the Divide lode claim), (2) the Guzman lode claim that contains a business establishment known as a "Rock Shop" (which is apparently the Look-Out Wedge lode claim), and (3) the Guzman lode claim known as the Cruzalite.

The Judge dismissed the third charge rejecting the Government's theory that valuable minerals have not been found within the limits of the claims so as to constitute a discovery based on the "excessive reserves" doctrine. He ruled that the Government did not present any evidence, and there is no evidence of record, from which any conclusions can be drawn concerning the question of excess reserves or whether a valuable mineral deposit has or has not been found within the limits of any one of the claims.

[1, 2] We have reviewed the entire record in this case and the arguments raised by Harborlite Corp. in its statement of reasons. From our review it is clear that Harborlite has not set out any new legal or factual arguments that have not already been thoroughly considered below. Judge Mesch's decision sets out in detail a summary of the chronology of the pertinent litigation involved, the evidence and applicable law as well as his findings and conclusions. We are in agreement with his decision, and therefore, we adopt it as the decision of this Board. A copy of the decision is attached hereto.

The contestees do not appeal from the Judge's findings but instead have filed a response to Harborlite's appeal stating that Harborlite has raised matters of title which the Judge had no jurisdiction to determine. Harborlite has not taken issue with the Judge's ruling that the perlite on the claims is properly classified as lode deposits. Nor does it object to that portion of the Judge's decision which held that areas of the claims not in conflict are properly subject to patent. Appellant objects to the Judge's finding that the area of the conflicting Guzman claims which encroach on the David R No. 1 lode and Superior Perlite No. 1 lode within the Superior Perlite No. 1 placer is not to be included in patent. It makes much of the fact that Bowen's work on the conflicting area preceded the Guzman development and emphasizes that Guzman's improvements are located outside the overlapping area. These arguments merit no lengthy consideration in light of the fact that the contestees specifically admitted at the time of the hearing that patent was not sought in these proceedings for the area encompassed by the David R No. 1 lode claim and the Superior Perlite No. 1 lode claim. It is sufficient to point out that it was established at the hearing that, as a result of a settlement agreement between the estate of Bowen, Superior Perlite Mines, Inc., and Union Trust Company, the successor in interest of Sil Flo

Corporation, the Bowen estate and Superior Perlite Mines, Inc., withdrew any claim of adverse possession which they may have had to the area encompassing the David R No. 1 and the Superior Perlite No. 1 lode claims (Tr. 14-15). The contestees admitted that the only area they were seeking patent to within the Superior No. 1 and No. 2 placer claims, at this time with this patent application, was an area marked in red on Govt. Exh. No. 1. The red area clearly and distinctly did not include these two lode claims (Tr. 17). Accordingly, the Administrative Law Judge appropriately eliminated the area of the David R No. 1 and the Superior Perlite No. 1 lode claims from the realm of his further deliberations.

Appellant makes a similar argument as to the Mary T and the Sandy No. 2 lode claims, alleging that the Judge failed to determine their status in this proceeding. It contends that they should have been included in the area which the Judge found qualified for patent.

Again, appellant has misinterpreted the bounds of the Judge's holding. The Judge did not eliminate the area of the Mary T and the Sandy No. 2 claims from his determination. Referring back to that point in the proceeding's where the contestees withdrew their patent application for certain areas within the claims, contestees in discussing Govt. Exh. No. 1, emphasized that only the area marked in red was the subject of this proceeding. That red area on the exhibit clearly includes claims labeled the Sandy No. 2 and the Mary T. The Judge acknowledged the inclusion of this red area in his decision at page three, where he referred to "the land shown in red on the map received in evidence as Exhibit 1," and stated, "This appears to restrict the acreage of the Superior Perlite No. 1 to roughly 80 acres and the land within the Superior Perlite No. 2 to about 25 acres." Also at page six of the decision he alludes to the total area that may qualify for patent when he pointed out what land has been held in a qualifying manner, specifically excepting only the area in the Superior Perlite No. 1 placer which overlapped and conflicted with the Guzman lode claims, stating:

Presumably, with the exception of a portion of the land within the Superior Perlite No. 1, the Guzman lode claims] the contestant does not question the contestee's assertion that all the land presently being claimed under the four placer locations has been held or possessed in such a manner as to meet the requirements of the law * * *.

Nowhere in the decision does the Judge single out the Mary T and the Sandy No. 2 claims for separate treatment or in any form to be eliminated from the area for patent. Accordingly, there is no basis for appellant's conclusion.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed, and the case is remanded to the Arizona State Office, Bureau of Land Management, for further appropriate action on mineral patent application Arizona 030706.

Edward W. Stuebing
Administrative Judge

We concur.

Douglas E. Henriques
Administrative Judge

Newton Frishberg
Chief Administrative Judge

April 10, 1978

UNITED STATES OF AMERICA,	:	ARIZONA 030706
Contestant	:	
v.	:	Involving the Superior
	:	Perlite No. 1 except that
	:	portion embraced in the
ESTATE OF ARTHUR C. W. BOWEN,	:	Elva F. No. 1 lode mining
Deceased, and SUPERIOR	:	claim, Survey No. 4677;
PERLITE MINES, INC.,	:	Superior Perlite No. 2
Contestees	:	(amended) except that portion
	:	embraced in the Sandy No. 1
HARBORLITE CORPORATION,	:	lode mining claim, Survey
Intervenor	:	No. 4677; Superior Perlite
DECISION :	:	No. 3; and Superior Perlite
	:	No. 4, all association placer
Appearances: :	:	mining claims, situated in
	:	Sections 8, 9, and 16,
	:	T. 2 S., R. 12 E., GSR Mer.,
	:	Pinal County, Arizona.

DECISION

Appearances: Fritz L. Goreham, Esq., Office of the Solicitor,
Department of the Interior, Phoenix, Arizona, for
contestant;

Dean Estep, Esq., Engdahl, Jerman & Estep, Phoenix,
Arizona, for contestees;

Sidney B. Wolfe, Esq. Wolfe & Harris, P.A., Phoenix, Arizona, for
intervenor.

Before: Administrative Law Judge Mesch

This is a proceeding involving the validity of four placer mining claims located under the General Mining Laws of 1872, as amended, 30 U.S.C. § 22 et seq. Pursuant to 43 CFR 4.451, the Arizona State Office, Bureau of Land Management, issued a complaint on February 20, 1976, charging that the subject mining claims are invalid because:

1. The claims, by the nature of the deposits, were improperly located as placer claims.
2. The contestees have not held and worked the claims in such a manner as to qualify them for patent under the provisions of 30 U.S.C. sec. 38.
3. Valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery within the meaning of the mining laws.

The contestees filed a timely answer and denied the charges in the complaint. A hearing was held on September 27 and 28, 1977, at Phoenix, Arizona. At the commencement of the hearing, Harborlite Corporation was permitted to intervene inasmuch as it was asserting an interest in the placer claims by reason of a conveyance from the contestee, Superior Perlite Mines, Inc.

The subject claims are within the Tonto National Forest. They are located approximately two and one-half air miles southwest of the town of Superior, Arizona. They are situated near the base of Picket Post Mountain in an area that has been plastered with mining claims. The contested claims and others in the area were located for perlite, a volcanic rock which, when crushed and heated, expands to a mass of glass bubbles. In the expanded state, perlite has various uses in the construction, oil, chemical, and other industries.

The Superior Perlite No. 1 was located on September 30, 1950. The Superior Perlite No. 2 was located on April 4, 1954. An amended location notice for this claim was executed on May 24, 1954. The Superior Perlite No. 3 was located on December 15, 1960. An amended location notice for this claim was executed on October 22, 1963. The Superior Perlite No. 4 was located on February 10, 1961. The Superior Perlite Nos. 1 and 2, as originally located or as amended, cover 160

acres each. The Superior Perlite No. 3 contains 80 acres and the Superior Perlite No. 4 covers 40 acres. The four claims are contiguous.

At the hearing the contestees stated they were not asserting any rights under the placer locations in the Superior Perlite Nos. 1 and 2 except as to land within the two claims shown in red on a map received in evidence as Exhibit 1. This appears to restrict the acreage of the Superior Perlite No. 1 to roughly 80 acres and the land within the Superior Perlite No. 2 to about 25 acres.

The contested mining claims and other claims in the area have a tortuous history of litigation. This is summarized in part in an appendix attached to this decision.

The present proceeding arises as a result of a decision of the Interior Board of Land Appeals directing the institution of contest proceedings to determine whether the perlite is properly characterized as lode or placer and, if the claims were improperly located as placers, whether the mining claimants are nevertheless entitled to a patent under the provisions of 30 U.S.C. § 38. Estate of Arthur C. W. Bowen, deceased, 18 IBLA 379 (1975).

The mining laws provide for the location of lode claims "upon veins or lodes of quartz or other rock in place bearing gold . . . or other valuable deposits", 30 U.S.C. § 23, and for the location of placer claims on "all forms of deposit, excepting veins of quartz, or other rock in place", 30 U.S.C. § 35.

In Iron Silver Mining Company v. Cheesman, 116 U.S. 529 (1886), the court approved the following definitions of a vein or lode:

. . . the term as used in the acts of congress is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock.

* * *

. . . a lode or vein is a body of mineral or mineral-bearing rock, within defined boundaries in the general mass of the mountain.

In United States v. Iron Silver Mining Company, 128 U.S. 673 (1888), the court defined the term placer claim as:

... ground within defined boundaries which contain mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place, that is, not fixed in rock, but which are in a loose state, and may in most cases be collected by washing or amalgamation without milling.

The perlite in the area of the claims lies in a "blanket" or "pancake" in an almost horizontal plane. In the past, there were a series of volcanic flows that laid down igneous material of different compositions. The perlite resulted from one of the flows. In its original state, the perlite was encased between two different types of rock. In places the upper rock or layer has been eroded away leaving the perlite exposed at the surface. In other places on the claims, the upper layer is still present. A qualified mining engineer called by the contestant characterized the perlite as a blanket lode sandwiched between a lower layer of rock, or foot wall, and an upper layer of rock, or hanging wall. The perlite is a rock and the mining thereof is essentially a hard rock operation. After the perlite is extracted from the ground, it is processed or in effect milled to produce a marketable product. The perlite in the area of the claims is used principally for filtering aids.

The contestees contend that the perlite is not a lode deposit because (1) it is found on the surface and is not covered by a layer of rock of other composition, and therefore, there is no hanging wall and the deposit is not in place; (2) the perlite contains nothing of value other than the rock itself, and therefore, it is not "rock in place bearing gold . . . or other valuable deposits"; and (3) the Act of August 4, 1892, 30 U.S.C. § 161, authorizing the entry of lands chiefly valuable for building stone requires the perlite to be located as a placer deposit.

The contestees' contentions can be simply answered by noting (1) the evidence does not support the conclusion that the upper layer of rock has been completely eroded from the area of the claims, and there are areas where the deposit is in place between a foot wall and a hanging wall; (2) the court in the Cheesman case, supra, recognized that a "lode or vein

is a body of mineral or mineral-bearing rock within defined boundaries"; and (3) by no stretch of the imagination are the lands within the claims chiefly valuable for building stone.

The question of whether the perlite within the contested claims is subject to location as a lode or placer deposit has been considered by the Superior Court of Pinal County, Arizona, the Superior Court of Maricopa County, Arizona, and on two occasions by the Arizona Court of Appeals. Bowen v. Cherni-Cote Perlite Corporation, 5 Ariz. App. 28, 423 P. 2d 104 (1967), and Bowen v. Sil-Flo Corporation, 9 Ariz. App. 268, 451 P.2d 626 (1969). The same three arguments presented by the contestees in this proceeding were made before the Arizona Courts. The four decisions of the Arizona Courts found that the perlite was properly characterized as a lode deposit. The two decisions of the Arizona Court of Appeals thoroughly considered the question of lode versus placer as applied to the perlite within the claims. I am in agreement with the extensive analyses made by the court and see no reason to repeat them here.

The evidence supports the first charge in the complaint. I find the four Superior Perlite placer mining claims invalid because a lode deposit will not sustain a placer location. Cole v. Ralph, 252 U.S. 286 (1920).

In its remand decision in this proceeding the Board of Land Appeals noted "that a mining claimant who has met certain fundamental requirements of the mining law, such as discovery, citizenship, and expenditure, and who has exclusively held and worked his claim for the period of adverse possession prescribed by the law of the State, is entitled to a patent under 30 U.S.C. § 38] regardless of the fact that the claim may have been improperly located as a lode or placer".

The possessory rights section of the mining laws, 30 U.S.C. § 38, provides in part:

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession

and working of the claims for such period shall be sufficient to establish a right to a patent thereto . . .

Arizona has a two-year, a three-year, and a five-year statute of limitations covering actions to recover real property. ARS §§ 12-522, 12-523, and 12-525. The five-year statute appears to be applicable in this case. Eagle-Picher Mining and Smelting Company v. Meyer, 68 Ariz. 214, 204 P.2d 171 (1949).

The Superior Perlite No. 1 placer was located in 1950. The Superior Perlite No. 2 placer was located in 1954. The two claims were conveyed to Arthur C. W. Bowen, one of the original locators, in 1954. In 1955, Bowen entered into a lease arrangement with Sil-Flo Corporation covering the two claims. The agreement with Sil-Flo remained in effect until 1972. The Superior Perlite No. 3 placer was located in 1960. The Superior Perlite No. 4 placer was located in 1961. The two claims were conveyed to Arthur C. W. Bowen, one of the original locators, in 1961. Bowen filed a patent application covering the four claims in 1961. The four claims have been the subject of extensive litigation from 1961 to the present with Bowen and his estate continually asserting an interest in and attempting to protect the claims. Affidavits of annual assessment work have been recorded attesting to the performance of work on the claims each year since they were located with the exception of two years between 1960 and 1962, and seven years between 1964 and 1971.

In support of the charge that the claims have not been held and worked in such a manner as to qualify them for patent under the provisions of 30 U.S.C. § 38, the contestant presented (1) the testimony of three witnesses who stated or implied that they had never seen Bowen or anyone in his behalf working the claims, and (2) evidence that a portion of the land within the Superior Perlite No. 1 placer was not held in a qualifying manner. Presumably, with the exception of a portion of the land within the Superior Perlite No. 1, the contestant does not question the contestees' assertion that all of the land presently being claimed under the four placer locations has been held or possessed in such a manner as to meet the requirements of the law.

Insofar as the "working" requirement is concerned, I cannot give any weight to the testimony of the contestant's three witnesses. The testimony is too general, vague, unreliable, and unconvincing. Among other things, their testimony is in

direct opposition to the undisputed fact that a portion of the lands were actively worked over a period of many years under a lease arrangement between Sil-Flo Corporation and Bowen. I accept the affidavits of assessment work, which were received in evidence without objection from the contestant, as establishing that the claims were worked for a period equal to the five-year time prescribed by the Arizona statute. Cain v. Addenda Mining Company, 24 L.D. 18 (1897); Capital No. 5 Placer Mining Claim, 34 L.D. 462 (1906).

With respect to the "holding" requirement, the contestant presented convincing evidence that a portion of the land within the Superior Perlite No. 1 has been and is claimed by third parties under conflicting mining locations who have, for a period in excess of 20 years as to some of the land and a period in excess of 5 years as to the remaining land, been actively and openly working and producing perlite from the land. The evidence, which is uncontradicted, supports the conclusion that Bowen did not hold and the contestees have not held the land within the Superior Perlite No. 1 that is embraced within (1) the Guzman lode mining claim that contains the workings known as the "Indian Caves" (which is apparently the Divide lode claim), (2) the Guzman lode claim that contains a business establishment known as a "Rock Shop" (which is apparently the Look-Out Wedge lode claim), and (3) the Guzman lode claim known as the Cruzalite.

The contestees contend that evidence relating to the possession of the land within the conflicting lode claims by Guzmans should not have been received and cannot be used to defeat their claim to a patent under 30 U.S.C. § 38. The contestees assert that the Guzmans and their predecessor in interest as to the Cruzalite claim did not institute adverse proceedings with respect to the 1961 patent application filed by Bowen, and, having failed to do so, they lost whatever possessory title they might have had to the lode claims. They argue that as against the Guzmans, Bowen's right to possession was conclusively established by reason of the failure to file an adverse claim.

I do not agree with the contestees' theory. The fact that the Guzmans may not have any right to possession as against Bowen should not prevent the Government from showing that Bowen can not meet the requirements of the law because the Guzmans, and not Bowen, were openly, exclusively, and actively working and holding the land. Under the contestees' theory, a mining claimant could obtain a patent under 30 U.S.C. § 38, not by reason of compliance with the law, but, simply because an adverse claimant who actually possessed and worked

the claim adverse to the patent applicant failed to institute adverse proceedings.

The evidence supports the second charge in the complaint as to any land the contestees are presently claiming within the Superior Perlite No. 1 placer claim that is embraced within the three Guzman lode claims identified above. With respect to the rest of the land the contestees are presently claiming within the four Superior Perlite placer claims, the only conclusion that can be drawn from the evidence is that the contestees have held and worked the claims in a sufficient manner to qualify them for patent under 30 U.S.C. § 38.

In its posthearing brief, the contestant states that the third charge in the complaint, i.e., valuable minerals have not been found within the limits of the claims so as to constitute a valid discovery, is directed basically to the "excessive reserves" doctrine. In addition, the contestant states "there is considerable doubt as to whether a valid discovery has been made" within the Superior Perlite Nos. 3 and 4 and "the question of a valid discovery within the Superior Perlite No. 2] is suspect".

The contestant did not present any evidence, and there is no other evidence in the record, from which any conclusions can be drawn concerning the question of excess reserves or whether a valuable mineral deposit has or has not been found within the limits of any one of the claims. Accordingly, the charge is dismissed from the proceedings.

Since a patent application has been filed, a problem arises as to whether a further hearing should be ordered to obtain sufficient evidence to make a determination on the questions of excess reserves and discovery. United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975). Under the circumstances, I am not inclined to order a further hearing. The question of the validity of the contested claims has been pending for an unreasonable length of time. The contestant has had more than adequate opportunity to fully and properly litigate the discovery issues. It appears to me that the contestant has not, as yet, even firmed up its reasons for contending that valid discoveries have not been made. A question exists as to whether upon adequate analysis the contestant will reach the conclusion that there is substance to the discovery issues. Accordingly, I am not willing to assume that the contestant, after engaging in a two-day hearing, is still

desirous of litigating the issues and compel the parties to participate in another hearing that may or may not be productive of additional information.

In its posthearing brief, the intervenor asserts that it has obtained all of the contestees' right, title and interest in the four contested placer claims, requests that it be substituted as the real party in interest and the applicant for patent, and asks for a ruling in favor of granting a patent in its name. I have no authority to determine the ownership of the contested claims. My sole function is to decide, on the basis of the evidence presented, whether the contested mining claims are invalid as alleged by the Bureau of Land Management in its contest complaint.

The contest complaint is sustained as to charge 1, sustained in part and dismissed in part as to charge 2, and dismissed as to charge 3.

Robert W. Mesch
Administrative Law Judge

APPEAL INFORMATION

The parties have the right of appeal to the Interior Board of Land Appeals. The appeal must be in strict compliance with the regulations in 43 CFR Part 4. (See enclosed information pertaining to appeals procedures.)

If an appeal is taken the adverse party or parties can be served at the addresses listed under the distribution shown below.

Enclosure: Information Pertaining to Appeals Procedures

Distribution: By Certified Mail

Office of the Field Solicitor
U. S. Department of the Interior
2080 Valley Bank Center
201 North Central Avenue
Phoenix, AZ 85073

Elmer C. Coker, Esq.
Luhrs-Central Building, Suite J
132 South Central Avenue
Phoenix, AZ 85004

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Phoenix, AZ 85003

APPENDIX

On June 5, 1961, Arthur C. W. Bowen filed an application with the Arizona State Office, Bureau of Land Management, seeking a patent for the four Superior Perlite placer claims. The matter was referred to the Forest Service, Department of Agriculture, for a field examination and recommendation. In a mineral report dated September 5, 1962, a Forest Service mining engineer concluded that the perlite within the four claims is a common variety of stone that can be mined and processed at a profit and was therefore locatable prior to the Act of July 23, 1955, 30 U.S.C. § 601, et seq. He recommended that (1) the Superior Perlite No. 1 and a portion of the Superior Perlite No. 2 be allowed to proceed to patent, (2) certain lands should be excluded from the Superior Perlite No. 2 before patent is granted because the lands are nonmineral in character, and (3) patent should be denied for the Superior Perlite Nos. 3 and 4 because the claims were located after July 23, 1955, when common varieties of stone were withdrawn from location under the mining laws. The mineral report was approved by the Chief Mineral Examiner, the Forest Supervisor, and the Acting Regional Forester. The Forest Service representatives apparently concluded that the claims were properly located as placer claims.

In December 1961, Chemi-Cote Perlite Corporation filed a protest with the Bureau of Land Management against the issuance of a patent to Bowen alleging, among other things, that any patent for the placer claims should exclude lands within Chemi-Cote's Mary T. and Sandy No. 2 lode claims. These claims were located in 1944 for perlite. The approximate twenty-five acres within the Superior Perlite No. 2 that the contestees are presently claiming under the placer location include all of the land within the Sandy No. 2 (about twenty acres) and a portion of the land within the Mary T. (about five acres). The remaining portion of the land within the Mary T. is part of the roughly eighty acres the contestees are claiming under the Superior Perlite No. 1 placer location.

In Chemi-Cote Perlite Corporation v. Bowen, 72 I.D. 403 (1965), the Department of the Interior ruled, among other things, that Chemi-Cote, in order to protect any rights which may have been established by its lode locations, was required to institute adverse proceedings in accordance with 30 U.S.C. §§ 29 and 30, and having failed to do so, it was precluded from asserting the existence of those claims as a bar to the recognition of the placer claims. The Department concluded its decision with the comment that "[w]hether the deposit is locatable as a placer or a lode, however, must still be determined in the adjudication of the patent application."

In June 1962, while Chemi-Cote's protest was pending before the Department, it instituted a State court proceeding to establish its possessory right to the two lode claims. In Bowen v. Chemi-Cote Perlite Corporation, 5 Ariz. App. 28, 423 P.2d 104 (1967), the Arizona Court of Appeals affirmed the judgment of the trial court that Chemi-Cote's right of possession of the two lode claims was superior to that of Bowen under his placer locations. The court disagreed with the Department's construction of the law and held that a lode claimant asserting a right to the same mineral deposit as a placer claimant can rely upon the "known vein or lode" provisions of 30 U.S.C. § 37 and need not institute adverse proceedings in accordance with 30 U.S.C. §§ 29 and 30. The court concluded that because of the nature of the mineral deposit Chemi-Cote's claims were validly located as lode claims.

Bowen sought review by the Arizona Supreme Court. In Bowen v. Chemi-Cote Perlite Corporation, 102 Ariz. 423, 432 P.2d 435 (1967), the Supreme Court reversed the judgment quieting title in Chemi-Cote and awarded Bowen damages on a counter claim for perlite removed by Chemi-Cote subsequent to the date of Bowen's patent application. The court agreed with the Department that a lode claimant asserting a right to the same deposit as a placer claimant cannot rely upon the "known vein or lode" provisions of 30 U.S.C. § 37, and must initiate adverse proceedings under 30 U.S.C. §§ 29 and 30. The court concluded:

... [I]t follows that Chemi-Cote's failure to adverse conclusively established, as between the two litigants, that Bowen's claim was properly located as a placer deposit. Since a placer discovery will not sustain a lode location, Cole v. Ralph, 252 286, 40 S.Ct. 321, 64 L.Ed 567 (1920), Chemi-Cote's location was thus defeated and its possessory title lost.

The intervenor, Harborlite Corporation, allegedly acquired the Mary T. and Sandy No. 2 lode claims as the result of a judgment against Chemi-Cote. According to Harborlite, a case is presently pending in the Federal courts to determine (1) whether the possessory right established by the Arizona Supreme Court in the Chemi-Cote case is conclusive upon the United States in considering Bowen's patent application, and (2) the effect of the Chemi-Cote decision in the event a patent does not issue for Bowen's four placer claims.

In December 1961, a timely adverse proceeding involving Bowen's patent application was instituted in the State court by Sil-Flo Corporation. In Bowen v. Sil-Flo Corporation, 9 Ariz. App. 268, 451 P.2d 626 (1969), review denied, the Arizona Court of Appeals affirmed a judgment of the trial court which (1) quieted the title of Sil-Flo to two lode claims, the Elva F. No. 1 and Sandy No. 1, (2) found that two lode claims held by Bowen, the David R. No. 1 and Superior Perlite No. 1, were valid lode claims, (3) declared that Sil-Flo was the owner of a right to mine and remove perlite from Bowen's two lode claims under a 1954 agreement with Bowen, (4) declared that Sil-Flo was the owner of a right to mine and remove perlite from the areas within Bowen's two placer claims, the Superior Perlite Nos. 1 and 2, that were not covered by the lode claims under a 1955 agreement with Bowen, and (5) declared that any title acquired by Bowen from the United States should be held in trust for Sil-Flo to the extent of Sil-Flo's rights in the claims. The court modified the lower decree to include a declaration that neither party established a right of possession or title to the areas in the placer claims outside of the four lode claims. The modification was ordered because there was no showing of any discovery of any ore within the placer claims other than the perlite which was determined to validate the lode claims.

Three of the lode claims, the Elva F. No. 1, David R. No. 1, and Superior Perlite No. 1, cover land within Bowen's Superior Perlite No. 1 placer claim. The fourth lode claim, the Sandy No. 1, covers land within Bowen's Superior Perlite No. 2 placer claim. In the early 1970's the contestees and Sil-Flo settled their differences. The contestees apparently gave up all their interests and claims to all land within the Superior Perlite Nos. 1 and 2 placers except (1) roughly eighty acres within the No. 1 placer, (2) approximately twenty-five acres within the No. 2 placer, and (3) the land within the David R. No. 1 and Superior Perlite No. 1 lode claims. The contestees take the position that they are entitled to a lode patent covering the David R. No. 1 and Superior Perlite No. 1 lode claims. A patent has been issued for the Elva F. No. 1 and Sandy No. 1 lode claims. Pursuant to the settlement agreement, the contestees allegedly conveyed all their interest in all land within the Superior Perlite Nos. 1 and 2 placers except as noted above to Union Trust Company as agent for the shareholders of Sil-Flo Corporation. Kory Industries Inc. allegedly acquired title in 1972 to all of the claims quitclaimed by the contestees to Union Trust Company.

The intervenor, Harborlite Corporation, claims title to the four Superior Perlite placer claims by reason of a quitclaim deed dated in 1969 by which Bowen allegedly conveyed the four placer claims to Superior Perlite Mines, Inc. and a deed dated in 1976 by which Superior allegedly conveyed the four placer claims to Harborlite.

By a decision dated March 22, 1972, the Arizona State Office, Bureau of Land Management, rejected Bowen's patent application for the reason that the court in the Sil-Flo case had held that Bowen was not entitled to possession of any of the land within the four placer claims. In Estate of Arthur C. W. Bowen, deceased, and Superior Perlite Mines, Inc., 14 IBLA 201, 80 I.D. 30 (1974), the Interior Board of Land Appeals reversed the State Office decision and held that (1) the decree of the Arizona court was not applicable to the Superior Perlite Nos. 3 and 4 placer claims since no adverse claim was filed as to those two claims, (2) the Arizona court did not have jurisdiction over the area in the Superior Perlite Nos. 1 and 2 placers outside of the four lode claims since Sil-Flo was claiming that area under arrangements between the parties and the claim of Sil-Flo was not adverse within the meaning of the statute, and (3) while the finding of the court on the issue of whether perlite is locatable as a lode or placer is binding on the adverse parties with respect to possession, it is not binding on the Government with respect to the determination of the validity of the claims. The Board remanded the case to the Arizona State Office for further consideration.

On April 22, 1974, the Arizona State Office issued a decision rejecting the Bowen application for patent on the ground that the perlite within the claims occurs in lode formation and as such the deposit would not impart validity to a placer claim. In Estate of Arthur C. W. Bowen, deceased,

18 IBLA 379 (1975), the Board of Land Appeals ruled (1) the Department of the Interior has the authority and duty to contest mining claims which it believes are invalid notwithstanding the claims are located in a national forest and the Forest Service has no objection to the approval of a patent application, (2) a mining claimant may be entitled to a patent by reason of 30 U.S.C. § 38 regardless of the fact that the claim may have been improperly located as a lode or placer and since the appellant asserts he has complied with that section he is entitled to present evidence on that issue, and (3) the appellant is also entitled to a hearing on the nature of the deposit as placer or lode. The Board directed the Arizona State Office to institute contest proceedings against the claims to determine whether appellant

is entitled to a patent under the provisions of 30 U.S.C. § 38 and pertinent regulations, and whether the perlite is properly characterized as lode or placer. The Board noted that even if the appellant is found to have qualified under section 38, it will still be necessary to determine the lode or placer character of the deposit in order to fix the purchase price under 30 U.S.C. § 29 or § 37.

One other proceeding adds further confusion. In March 1965, the Arizona State Office, at the request of the Forest Service, initiated proceedings attacking the validity of a group of lode claims held by Mike Guzman, Sr., and Mike Guzman, Jr., Contest No. 028261-E-1-15. The proceeding was allegedly instituted because the Forest Service felt the claims were invalid inasmuch as they were lode claims rather than placer claims. In other words, the Government apparently took exactly the opposite position from that which it is taking in the present proceeding.

The Guzman claims covered land within Bowen's Superior Perlite No. 1 placer claim and land adjoining that claim on the west. In a decision dated June 1, 1966, the Hearing Examiner stated that (1) the parties stipulated and agreed that Guzmans had abandoned any rights they might have to any lode deposits in the land embraced by all of the lode claims except that part of five claims extending into the area covered by Bowen's patent application, and (2) the Government withdrew the complaint as to the portions of the five claims extending into Bowen's placer claim. The Hearing Examiner declared the lode claims lying entirely outside Bowen's placer claim null and void for lack of a supporting lode deposit and dismissed the proceedings as to the five claims in their entirety. That decision apparently became the final decision of the Department.

Guzmans' five lode claims and other claims they hold apparently cover all of the area that the contestees are presently claiming under the Superior Perlite No. 1 placer claim, with the exception of about twenty acres (within the Mary T. claim). While the five lode claims, and at least one of the other claims, were located prior to Bowen's placer claim, the Guzmans or their predecessors in interest did not institute adverse proceedings to protect any rights that may have been established by the lode locations. The rulings of the Department and the Arizona Supreme Court with respect to Chemi-Cote are controlling with respect to the Guzmans.

By a patent application dated February 10, 1966, Mike Guzman, Sr., applied for patent to a group of placer claims adjoining Bowen's Superior Perlite No. 1 placer claim on the west. The lands applied for were previously included in portions or all of the lode claims involved in the Hearing Examiner's decision of June 1, 1966. In his patent application, Guzman stated the placer claims were originally mistakenly located as lode claims and upon advise of counsel he amended the claims to placer claims on June 26, 1965. The patent application is still pending.

